Local 554, Graphic Communications International Union, AFL–CIO *and* Salem Gravure, a Division of World Color Press. Case 14–CB–7382

March 25, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 9, 1991, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions, a brief in support of its exceptions, and a brief in opposition to the Charging Party's exceptions. The General Counsel filed an answering brief to the Respondent's exceptions, and the Charging Party filed exceptions, a supporting brief, and a response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 5.

''5. By failing and refusing to execute the collective-bargaining agreement prepared and presented to it for signature on or about April 18, 1990, the Respondent violated Section 8(b)(3) of the Act. The aforesaid unfair labor practice has a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 554, Graphic Communications International Union, AFL–CIO, Salem, Illinois, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Failing and refusing to execute the collective-bargaining agreement presented to it for signature by Salem Gravure, A Division of World Color Press, about April 18, 1990.''

2. Substitute the following for paragraph 2(a).

''(a) On request, execute forthwith the contract presented to it for signature by Salem Gravure, A Division of World Color Press, about April 18, 1990.''

3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN STEPHENS, dissenting.

Contrary to the judge and my colleagues, I find that the General Counsel has failed to prove that by refusing to execute the collective-bargaining agreement presented to it on April 18, 1990, the Respondent violated Section 8(b)(3) of the Act. Specifically, I find that it has not been established that the Respondent was obligated to execute the agreement, because the agreement, by its express terms, could not become binding without the approval of the Respondent's International president, and there is no evidence that such approval had been obtained.

The Respondent and the Employer negotiated a midterm modification to their collective-bargaining agreement. The unit employees voted to accept the Employer's proposal. This proposal, drafted by the Employer, contained the following statement: ''The terms and conditions of this Agreement are subject to review of the International and the Agreement does not become

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Our dissenting colleague contends that the complaint should be dismissed because there is no evidence that an alleged condition precedent of International approval was fulfilled, and thus there is a failure of proof that the Respondent was obligated to execute the agreement. We disagree. As the judge noted, ''[t]he existence of a requirement for international approval suggests a correlative duty of due diligence on the part of a local to seek such approval or at least to bring the contract to the attention of the international for its consideration.'' In our view, only after it has first been proven that the negotiated agreement was promptly submitted to the International is the question of International approval put in issue. In this regard, we note that the Respondent has exclusive control of the means of submission of the contract to the International and is the party in possession of the facts concerning that submission. For this reason, we find that the burden of proving due diligence in the submission of the agreement to the International may fairly be placed on the Respondent. Here, despite completion of negotiations and agreement on a contract, the Respondent made no showing that, in the next year and one-half, it submitted the contract to the International for approval, or in any way even advised the International of the negotiated terms of the agreement. Plainly, the Respondent has failed to carry its burden. *Hiney Printing Co.*, 262 NLRB 157 (1982), enfd. 733 F.2d 1170 (6th Cir. 1984), relied on by the dissent, is distinguishable. There, the respondent local's president, Bockman, was in telephone contact with the International's president concerning the contract negotiations, and the question of Bockman's diligence in presenting the completed contract to the International never arose. Rather, the issues in *Hiney* were whether approval of the International was required and, if so, whether the International *in fact* had approved the contract. Accordingly, for the reasons the judge elaborates, including his finding that the Respondent is estopped from raising any failure to obtain International approval, we find that the Respondent violated Sec. 8(b)(3).

[3] We shall amend the judge's Conclusions of Law and modify the recommended Order to refer to the date the contract was submitted to the Respondent for signature as April 18, 1990, rather than April 18, 1991.

a valid and binding document without the approval of the International President.'' The proposal also contains a signature line for the president of the Respondent's International.

In its posthearing brief to the judge, the Respondent argued that the International's approval was a condition precedent to the validity of the contract, and as there is no evidence that the International approved the proposal, no 8(b)(3) violation could be found. The judge noted that there was no evidence, and no party contended, that the Respondent ever submitted the contract proposal to the International for approval.[1] Stating that a requirement of International approval suggests a correlative duty of due diligence on the part of a local to submit the proposal to its International for consideration, the judge specifically found that the Respondent did not seek the approval of its International, and concluded that the Respondent, having received the benefit of its bargain (the Employer had implemented the proposal and had agreed not to close the plant), was thus estopped from asserting the lack of International approval as a basis for failing to execute the agreement.

In its exceptions, the Respondent argues that the complaint should be dismissed because the General Counsel never established that the condition precedent of International approval had been fulfilled. Further, the Respondent argues that the record does not support the judge's finding that the Respondent failed to submit the ratified contract to its International for approval. Contrary to the judge and my colleagues, I find merit to the Respondent's arguments.[2]

In *Hiney Printing Co.*, 262 NLRB 157 (1982), enfd. 733 F.2d 1170 (6th Cir. 1984), the Board dismissed a similar 8(b)(3) allegation involving the same International approval clause as the one at issue in the instant case. In *Hiney*, there was a failure of proof that the union's International had approved the contract, and consequently the Board adopted the judge's finding that the union was not required to execute the modification agreement. Thus, under *Hiney*, once it has been established that International approval is a condition precedent to a valid and binding agreement, it is the General Counsel's burden to establish that the agreement had been approved by the International.

As noted by the judge, the existence of the condition precedent of International approval was established in the instant case by the Employer's contract proposal, introduced into evidence by the General Counsel, which contained clear language stating that International approval was required. I find nothing in the record indicating that, despite the presence of such clear language, approval by the president of the Respondent's International was not actually required.[3] Having established the existence of a condition precedent, the General Counsel was thus required to show, as part of his 8(b)(3) case, that the requisite approval had been obtained. No such evidence of International approval, however, was offered, and no such contention was made.

Despite the absence of any evidence that the agreement had been approved by the Respondent's International, the judge nevertheless found that the Respondent violated Section 8(b)(3) by refusing to execute the document. The judge's basis for finding a violation came from the judge's finding that the Respondent never submitted the agreement to its International for consideration. The judge made this finding, however, not from any record evidence that the agreement was not submitted to the International, but from the lack of record evidence to the contrary. Having found that the Respondent never submitted the agreement to its International, the judge further found that the Respondent was estopped under these circumstances from asserting that the lack of International approval excused the Respondent from its obligation to execute the contract.

[1] The only evidence provided at the hearing concerning the International approval requirement, other than the Employer's contract proposal, was the testimony of Hartwell, the Respondent Local's president, who stated that the contract had not been approved by the International president. The judge discredited any testimony provided by Hartwell that could not be corroborated (JD fn. 9). There was no other testimony corroborating Hartwell's statement regarding the lack of International approval.

[2] For the purpose of this decision, I assume that the provisions of Sec. 8(d) of the Act, requiring parties to a collective-bargaining agreement to embody the terms of such agreement in a written, executed contract, apply here, where the parties have voluntarily agreed to a midterm modification of their collective-bargaining agreement.

[3] In its supplemental brief to the judge, the Employer attached as an appendix to the brief an affidavit from Plant Manager Saxer stating that the parties had never considered International approval to be a condition precedent to any agreement negotiated by the parties. The judge reopened the record to admit the affidavit into evidence, but concluded that such evidence does not relax the requirement of International approval for the instant contract. The Respondent excepts to the admission of the affidavit. I find merit to this exception. This affidavit did not warrant reopening the record, as it did not constitute newly discovered evidence, nor was it unavailable at the time of the trial. See *Mack's Supermarkets*, 288 NLRB 1082 fn. 1 (1988). But even assuming that this affidavit was properly admitted into evidence, I find that this evidence does not nullify the clear language stating that International approval of this agreement was required.

Contrary to my colleagues, I disagree with the judge that these circumstances give rise to an estoppel situation. First, there is nothing in the record supporting the judge's finding that the agreement was never submitted to the Respondent's International. More importantly, however, I find that the judge incorrectly placed the burden of proof on the Respondent in this case. The primary question at issue here is whether the General Counsel has established that the Respondent was obligated to execute the agreement. Before the Respondent need provide a defense to its failure to comply with an obligation to execute the agreement, the General Counsel must first provide evidence showing the existence of such an obligation.

The evidence establishes that the agreement at issue here contained a condition precedent, which under *Hiney*, had to be fulfilled in order to obligate the Respondent to execute the contract. There has been no showing, however, that the condition precedent was fulfilled. The General Counsel has thus failed to prove that the Respondent was under any obligation to execute the contract. These circumstances do not give rise to an estoppel situation, as the Respondent cannot be estopped from asserting that the General Counsel did not introduce record evidence sufficient to establish a violation of Section 8(b)(3).[4]

Because the evidence establishes that the agreement presented to the Respondent for execution on April 18, 1990, required International approval, and because it has not been shown that the Respondent's International president approved the contract, I would find that there is a failure of proof that the Respondent was required to execute the contract presented to it on April 18, 1990. Accordingly, I would dismiss the complaint.

[4] Unlike the judge and my colleagues, I find it unnecessary to address the issue of whether the requirement of International approval suggests a correlative duty of due diligence on the part of a local to submit the agreement to its International for consideration. The General Counsel has the burden of alleging and proving the existence of a violation of the Act. Therefore, assuming that a duty of due diligence exists, and assuming that a breach of this duty is the basis for finding a violation, the General Counsel would have to allege and prove a breach of this duty if a violation is to be found. In the instant case, the General Counsel introduced evidence, i.e., the Employer's contract proposal, that established the existence of the requirement of International approval. The General Counsel did not, however, allege or prove that the Respondent breached its duty of due diligence by not submitting the proposal to its International. Therefore, as there is no allegation, and no proof, that the Respondent breached any duty of due diligence, no violation can be found based on the breach of such a duty.

My colleagues contended that *Hiney Printing Co*., supra, is distinguishable because the evidence in that case established that the respondent local discussed the contract negotiations with the president of its International and the question of the respondent's diligence in submitting the completed contract to the International never arose. In my view, this evidence does not make *Hiney* distinguishable. In *Hiney*, the evidence established a requirement of International approval, and the General Counsel did not prove that the requisite approval had been obtained and did not allege or prove that the respondent local failed to submit the contract to its International. In the instant case, the evidence presented by the General Counsel established a requirement of International approval. As in *Hiney*, there is no evidence in the instant record that the requisite approval was obtained, and there is no allegation or proof that the Respondent failed to submit the contract to its International.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to execute the collective-bargaining agreement presented to us for signature by Salem Gravure, a Division of World Color Press, about April 18, 1990.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, execute forthwith the contract presented to us for signature by Salem Gravure, a Division of World Color Press, on or about April 18, 1990.

LOCAL 554, GRAPHIC COMMUNICATIONS
INTERNATIONAL UNION, AFL–CIO

Frenchette C. Potter, Esq., for the General Counsel.
Thomas D. Allison, Esq., of Chicago, Illinois, for the Respondent.
James P. Mannion Jr., Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

FINDINGS OF FACT

A. *Statement of the Case*

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me on an unfair labor practice complaint,[1] issued by the Regional Director for Region 14, which alleges that the Respondent, Local 554, Graphic Communications International Union, AFL–CIO (Union),[2]

[1] The principal docket entries in this case are as follows:

Charge filed by Salem Gravure, a Division of World Color Press (Salem Gravure) against the Respondent on April 24, 1990; complaint issued against the Respondent by the Regional Director for Region 14 on May 24, 1991; Respondent's answer filed on June 5, 1991; hearing held in St. Louis, Missouri, on January 15 and 16, 1991; briefs filed by the General Counsel, the Charging Party, and the Respondent with me February 26, 1991, and supplemental briefs requested by me filed on or before April 1, 1991.

[2] I find that Salem Gravure, a Division of World Color Press is a Delaware corporation, which maintains an office and place of business in Salem, Illinois, where it is engaged in the business of magazine printing. During a 12-month period, the Charging Party has pur-

violated Section 8(b)(3) of the Act. More particularly, the complaint alleges that, since April 20, 1991, the Respondent has failed and refused to execute a written contract embodying the terms and conditions of an agreement which was orally concluded with Salem Gravure. The Respondent insists that it is under no obligation to sign a contract with the Charging Party because the parties failed to reach an understanding on several key points, that a document presented to it for signature on or about April 20, 1991, did not correctly set forth various oral understandings which had been reached, and that the Respondent is under no obligation to sign a written agreement because the total agreement was not approved by its International Union, as required by the terms and conditions of the contract. On these contentions the issues were drawn.[3]

B. *The Unfair Labor Practices Alleged*

Charging Party Salem Gravure operates a large printing plant in Salem, Illinois, where it prints all or part of several nationally known magazines. It is part of an Illinois-based chain of printing plants which operates similar establishments both in that State and in adjacent jurisdictions. The Salem plant employs about 900 employees who work on three shifts in three different bargaining units. The pressroom employees are represented by Local 780-C of the same International with which the Respondent is affiliated. Photoengraving employees are represented by the Respondent in their own unit and about 325 bindery and shipping and receiving employees are represented by the Respondent in the bargaining unit which is in issue in this case. Salem Gravure and the Respondent have had a collective-bargaining relationship dating back to 1976, covering bindery and shipping and receiving employees. The collective-bargaining agreement ostensibly in effect at the time the events in this case began to occur became effective on September 11, 1988, and had an expiration date of September 8, 1991.

On September 13, 1989, company officials, including William C. Feagans, the director of human resources for the entire chain, and Salem Plant Manager Robert Saxer, called officials from all three bargaining units together at the plant training room for a meeting. They told assembled union representatives that the Company was facing huge financial losses and, if substantial relief from the provisions of the current contracts covering all three bargaining units was not forthcoming, the Company would close the Salem plant on April 1, 1990. On September 28, a second meeting was held between management representatives and officials of both locals at which time the same essential message was conveyed with the use of visual aids. No specific demands for relief from existing contractual provisions were made but statistical information was provided outlining the dollar amounts of relief needed in each department. It became abundantly clear that what the Company was seeking was not minor revisions in existing contracts but a wholesale substitution of new contracts for the existing agreements which covered each of the three units in the plant.[4] The Company also solicited suggestions and proposals from the unions involved.

Substantive meetings were held with representatives of the Respondent concerning the bindery-shipping and receiving unit on October 10 and 12. Feagans and Saxer were the chief company spokesmen. Former Union President Gerald Hartwell, a longtime employee in the shipping and receiving department, was the chief union spokesman.[5] He was accompanied by a committee of employees composed of Marty Williamson, Carroll Brown, William Gnaw, Betty Trammel, Betty Young, and Robert Yount. The first actual proposal given to union representatives was handed to Hartwell and others at the October 12 meeting. Entitled ''Revision-October 11, 1989,'' the proposal was generated from the company computer and used the text of the 1988 contract as its basic format, deleting those portions of the 1988 agreement which the Company wanted omitted and inserting in lieu thereof new contract language on which it sought agreement. The new matter was set forth in bold type to distinguish it from portions of the existing agreement for which no revisions were requested.[6] The Company also gave the union representatives a summary of changes, i.e., an extract from the complete contract proposal of the new portions set forth in boldface type. Company representatives testified that they adopted the practice of presenting even initial proposals in the form of actual contract language rather than merely discussing proposals in concept form because, in previous negotiations, they had experienced difficulties with Hartwell in getting his assent to language which had been drafted to carry out agreements previously reached.

The changes that the Company sought were drastic. The downward revision in the basic pay scales it requested in the bindery and shipping department called for cuts up to $3.50 per hour when compared to third-year increases and immediate reductions in wages which, in some instances, were more than $1 an hour. Wage cuts were proposed to be made in two stages.[7] The largest cuts were in the less skilled and lower rated classifications. The Company also wanted an increase in the deductible figure in the health insurance plan as well as changes in the level of benefits. It sought to eliminate one of the paid holidays and a paid personal leave day. It offered an increase in the size of life insurance policies

chased and received at its Salem, Illinois plant goods and materials valued in excess of $50,000 directly from points and places located outside the State of Illinois. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] The transcript is noted and corrected.

[4] The five job classifications covered by the contract involved in this dispute are:

Grade A	operator (bindery)
Grade B	counter (bindery)
Grade C	forklift operator (shipping and receiving)
Grade D	feeder (bindery)
Grade E	general services - janitorial, etc.

[5] Hartwell was replaced as union president in January 1991, just a few days before the hearing in this case.

[6] The old contract, as well as its proposed replacement, contained more than substantive provisions conventionally arranged in separate articles by subject matter. It also included a host of memoranda, noted by the various dates on which they were agreed to, that were appended as attachments and which constituted a part of the ongoing collective agreement between the parties.

[7] The 1988–1991 contract called for three wage increases in each classification—one on the date of the execution of the contract and the other two on the next two anniversary dates.

from $14,000 to $20,000 but it sought to eliminate automatic overtime for weekend work, i.e., time and a half for any Saturday work and double time for any Sunday work. For this provision in the existing contract, it wanted to substitute a practice of what might be called a sliding workweek, meaning that Saturday overtime would be paid only after an employee had completed 37-1/2 hours of work in that week and Sunday overtime would be paid only after completing 45 hours of work in a given week. In addition to changes in the economic package, the Company asked for revisions in the language of the grievance and arbitration provision and a 5-year contract, beginning on the date of the agreement, in place of the current 3-year contract which had 2 additional years to run.[8]

Two proposed changes generated most of the controversy in this case. One involved the application of the new weekend overtime proposal to certain specific fact situations which were discussed during negotiations. To determine eligibility for Saturday or Sunday overtime, the Company was willing to give an employee credit for absences during the week due to specific stated causes and to pay Saturday or Sunday overtime, when those days were actually worked, notwithstanding the fact that the employee had not completed 37-1/2 or 45 hours before the weekend day in question. Absences due to vacation, holidays, lack of work, bereavement, and jury duty would, under the company proposal, not he counted against an employee's weekly work record in determining eligibility for weekend overtime. As discussed later, questions arose as to the application of the provision involving absences due to ''lack of work,'' a term of art in the old contract which was not defined but which had applicability to situations unrelated to weekend overtime.

The Company also proposed to establish a work pool made up of laid-off employees and others who might be hired for the pool when insufficient numbers of laid-off employees were available. Under this proposal, when short term vacancies might arise because of illness, vacation, or temporary overloads, the Company could call on the services of a person in the work pool rather than recall an employee from layoff under the seniority provisions of the contract. Such an employee would be employed at 75 percent of the wage rate for the job to be filled and would receive no fringe benefits. The issue which ultimately arose concerning the work pool provision was whether it applied to work in the shipping and receiving department or whether it was limited solely to the bindery. Hartwell did not think that higher paying jobs should be filled by work pool personnel and argued that employees in lower paying classifications should be allowed to upgrade before work pool employees were hired, leaving work pool employees to fill, for the most part, the lower classifications temporarily vacated as a result of short-term upgrading. The Company agreed to that request.

The Company then prepared another document, entitled ''Revision—October 12, 1989,'' a complete contract proposal incorporating alterations in its original proposal resulting from the October 12 discussion, again with new matter set out in boldface type. This document formed the basis for further negotiations which took place on October 14. At that time, company negotiators told union representatives that suggestions made by the Union did not contain sufficient relief to prevent the Company from closing the plant, as it had originally stated it would do. The Company printed out an extract of its proposal, as of October 15, and gave it to Hartwell, along with 400–450 copies to be given to the membership of his unit. A meeting of the membership had been scheduled on Sunday afternoon, October 15, at which time the documents were distributed. The employees rejected the company proposal, reportedly by a vote of two to one. During this same timeframe, employees in the other two bargaining units had voted to approve new company proposals which had been presented to their respective representatives.

On Monday morning, October 16, 1989, the Company posted the following notice:

> Last evening, October 15, we were advised by representatives of Local 554-M that, even though Local 787-C and Local 554-P have ratified labor contract modifications, Local 554-M has rejected modification of labor contract terms that would avoid the closing of the Salem Gravure plant and transfer work to other plants.
>
> The Company and Salem Locals negotiated diligently and examined and exhausted all alternatives to arrive at a reduction of costs which could save the plant. We are disappointed that those efforts failed to produce relief!
>
> We will be directing efforts shortly to initiate the phasedown of Salem Gravure leading to a final closedown by April 1, 1990.
>
> We have advised the Salem locals that we stand ready, upon notice from them, to work out separation agreements which would enable an orderly phasedown of this facility upon completion.

A press release advising the public of the closedown decision was sent to local news media.

Shortly thereafter, Respondent's representatives approached Saxer and Feagans to suggest that additional negotiations might be in order. Feagans agreed but told them that the Company had to make a final decision soon. Another bargaining session was held on October 17. At that time, Stanley Eisenstein, the Union's attorney, was present.

At this meeting, the parties discussed job bidding, wage rates, weekend overtime, and other matters. Among the matters explored in some detail was the question of how and when ''lack of work,'' as that term had been used at the plant, would be credited to an employee's workweek so as to entitle him to Saturday and Sunday overtime. Among other things, the Company agreed to delay for 1 year the implementation of the new reduced rates for operators, who are the highest ranking employees in the unit.

On the following day, the Company prepared another extract of changes representing the status of its proposal following the October 17 meeting. It made 400 or so copies and gave them to Hartwell for distribution to the membership of the unit. At a meeting of the unit on October 19, Hartwell presented the company proposal. He testified that he made no recommendation either to accept or reject it. The membership voted to accept it and the Company was immediately notified. On October 23, the Company put into effect all the

[8] The Company has yet to make a second pay cut, although the time for this revision, as set forth in the new agreement, has long since passed.

provisions of its proposal, except for the wage rate differentials which were scheduled to take effect at a later date. It also announced that the plant would not close.

On November 7, a meeting of company and union representatives was called to discuss a variety of matters. At this meeting the question of upgrading from the bindery to the shipping and receiving department came up. Feagans told union representatives that it was not going to recall any laid-off shipping and receiving employees to fill temporary vacancies before finding out if there were any lower rated bindery employees who wanted a temporary upgrade. He announced that the Company would be posting bids for these short-term openings. He also stated that the Company would provide training for bindery employees who wanted these temporary upgrades to shipping and receiving. The posting took place on November 27. The notice, directed to all Class ''D'' employees, stated, in part:

> Bids are being requested for Class ''D'' employees wanting to upgrade into Class ''C'' in conjunction with the newly organized work pool.
>
> Under this provision, a Class ''D'' employee would upgrade into a Class ''C'' position to cover for a scheduled time off and a Work Pool employee would be used to replace the Class ''D'' employee. This would give the Class ''D'' employee the opportunity to work at a higher pay scale.
>
> Interested employees will be provided with a two-week accelerated training period to qualify as a Class ''C'' employee in all areas except the premium Class ''C'' positions.

Following the posting of this notice, Hartwell wrote Feagans a letter, dated November 30. He stated that, after reviewing the final summary of changes given to the Union before the ratification vote, the Union had come to the conclusion that ''to implement a work pool under the conditions spelled out in the Summary would be a violation of other areas of the contract.'' He specifically mentioned the seniority provision, which required both layoffs and recalls by classification, and pointed out that the agreement called for classification seniority. He noted further that ''both sides at the bargaining table failed to notice this contradiction in language.'' He added that the plant had never experienced upgrades, only permanent openings, in the Class ''C'' jobs and that the Union had never agreed to allowing employees from one area to fill better jobs in another work area. He asked that the Company refrain from implementing the work pool provision in the revised contract until the Company resolved the Union's concerns as noted in the letter.

On December 12, Feagans sent Hartwell a detailed response to the November 29 letter. Hartwell had asserted that, during negotiations, there had been an understanding between the parties that the work pool language was only tentative and that the parties would get together after the ratification vote to work out final language. Feagans contradicted the statement and pointed to work pool language in the final revised summary which contradicted Hartwell's assertion. He denied that there was any conflict between language in the seniority section and language in the work pool section. He reminded Hartwell that both parties had a legal obligation to execute a written contract embodying the agreement reached in October before the ratification vote and noted that a meeting for that purpose had been arranged for December 18.

On December 18, when the parties met, the Company presented Hartwell and the executive board of the Respondent six copies of a complete draft of the revised agreement for their signatures. Hartwell said that they would review the draft and respond to the request for signatures. Early in January, another request was made to Hartwell to sign the draft. He said he still needed additional time to review the document. On January 22, 1990, Hartwell wrote Feagans a letter raising some questions and objections concerning several matters. It stated:

> In reviewing the guidelines for Bindery work pool employment, we have several questions that need to be answered. Under rates of pay, we see a wage progression for new hires. We would like to know how this could be when the contract calls for no wage progressions. It states that they will all get 75% of the feeder scale. We don't have any employees at a new hire-in rate.
>
> The overtime rates on the work pool would only be used for the 6th and 7th day when all other regular overtime was filled under our present overtime procedures. When we work on the weekends, it is to cover only positions that would be filled by regular employees who are working that week only. Weekend overtime is filled. We have not discussed changing our overtime procedures.
>
> Under fringe benefits, you have failed to notify us if permanently laid off employees in the work pool still have rights under the Cobra plan. We didn't discuss this in our bargaining session.
>
> Under work opportunities, what happens if a pool employee signs up for all three shifts and is not home when the company calls the first time? How many times will each employee be called?
>
> As for the Notice about the Guidelines for the work pool, the guidelines have to follow the agreement under Article XV Work Pool in the contract and not at Salem Gravure's discretion. Under Article XV, any guidelines would be a modification of the agreement and could only be implemented if both sides agree. This is not what the contract says. Your attempt to make up new rules under the pretext that they are guidelines would be a violation of what was agreed to under the contract and the implementation of new rules without both sides agreeing.
>
> Under the provisions of the contract in the work pool language, it does state that upgrades will be used before any pool employees are used to fill open positions. The ''E'' classification openings will only be filled when we reach an agreement that both sides can live with. The present contract doesn't explain how these positions will be filled and any change from the contract would mean that the contract would have to be amended to implement the change.
>
> We will not agree to any changes under the contract unless it is by mutual agreement. If you wish to meet and change the provisions under the work pool agreement, we will be happy to do so as long as it is by mutual agreement. The Company's repeated abuse and vio-

> lation of our contract could be settled by an unfair labor charge that the Company bargained in bad faith.

On the following day, he wrote Feagans another letter advancing more questions and objections on other subjects. On January 30, Feagans provided Hartwell with a detailed reply to what he characterized as ''interpretational questions.''

The joint standing committee, composed of representatives of the two parties, met on February 6 and discussed other differences of opinion, as well as pending grievances. Hartwell raised the objection that an attrition clause applicable to the shipping and receiving department had been omitted from the draft submitted for signature. In a letter dated February 6 to Hartwell, Feagans agreed that the clause was missing from the document and asserted that the omission was an oversight on the part of the Company in preparing the document. He agreed that the clause should be included in the executed copy of the agreement. He also pointed out that certain problems of interpretation had been raised so he attempted to set forth in his reply what he felt were the resolutions to these disputes. Feagans suggested that, if the Union and the Company agreed to these resolutions, they could be reduced to writing and added to the contract draft. Such items included the subjects of overtime, work pool, laid-off shipping and receiving employees, and the grievance and arbitration procedure.

On March 7, Feagans mailed the Union copies of a further revised draft of the contract containing corrected language in the grievance and arbitration section. It included the memorandum relating to attrition in the shipping and receiving section. In a cover letter he asked Hartwell to sign the document. On two occasions during March, Feagans again asked Hartwell orally to sign. On March 19, Hartwell said that he would not do so, whereupon Feagans informed him that the Company was going to file an unfair labor practice charge.

On March 20, the Company filed an unfair labor practice charge against the Respondent in Case 14–CB–7382, charging that the Union had violated Section 8(b)(3) of the Act by refusing to execute a copy of the agreement which the parties had reached on October 19. After an investigation, the Regional Office determined that the charge should be dismissed because it concluded that the document presented to the Respondent in this case for signature did not reflect the total agreement which had been reached in October. Specifically, the Regional Office found that the work pool provision of the March 7, 1991, draft was so worded that it could apply to the shipping and receiving department although, by its terms, it was not specifically directed to that department. The Region further found that the parties had not agreed that the work pool provision should apply to that department and, in the absence of such an agreement, a complaint was not warranted because the Respondent could not be lawfully compelled to sign something it had not actually agreed to.

On receiving the Regional Office's response to the charge filed in Case 14–CB–7382, the Company revised the contract draft by inserting the following language in the work pool section: ''This Article, Article XV Work Pool, does not apply to the Shipping and Receiving Department.'' It submitted a complete contract document containing this revision to Hartwell on the afternoon of April 18 with a letter which read:

> I am hand delivering to you this afternoon this letter and revised Labor Agreement. This Labor Agreement is identical to the agreement I gave you on or about March 7, 1990, except one sentence has been added to Article XV, in the work pool, which states, ''This Article, Article XV, Work Pool, does not apply to the Shipping and Receiving Department.'' This sentence should resolve completely any concern you may have on the application of Article XV Work Pool.
>
> It is the purpose of this letter to request that GCIU Local #554 execute this agreement. In order to provide you time to review the agreement please respond in writing to me, no later than 9:00 a.m., Friday, April 20, 1990 stating your decision on the execution of the agreement. If we do not receive a response from you by 9:00 a.m., Friday, April 20, 1990, we shall consider this a refusal on your part to execute the agreement.[9]

The parties met briefly on the morning of April 20. Hartwell handed Feagans a letter which read:

> In response to your letter dated April 18, 1990, I would like to commend you for your concerns for the problems we have over the open issues from our labor agreement. You state in your letter that Local 554M is refusing to execute any agreement. The Company has executed the agreement whenever they feel the need is appropriate. We believe language is clear and decise [sic] and should be administered by its content and not by interpretation. We have found errors in the copies of the new contract that you have requested us to sign and need a meeting to properly adjust these errors.

Feagans' verbal response to Hartman's letter was that any disputes between the parties were merely interpretational and should be submitted to an arbitrator.

Later in the day Feagans approached Hartwell at his work station and told him that he needed a formal response from the Union. Hartwell said that there were still some errors in the contract. Feagans asked what the errors might be and Hartwell said that he did not know because he had not looked through the contract but his executive board was going to do so. Feagans suggested that Hartwell and the members of the union board sit down immediately and go through the contract in detail so the board and Hartwell could show him exactly where any errors might be. He even offered to release employees from work so that they could do so. Hartwell said that some of the executive board worked the third shift and were not available. Feagans then suggested going to the conference room and arranging a telephone conference call with any union board members who were not at the plant so they could discuss the contract with those who were on the job. Hartwell refused and said simply that the Union was not going to sign. On April 24, the Company filed the charge in this case. The plant has remained open and in full operation, notwithstanding the refusal of the Respondent to execute a contract.

[9] At the hearing, Hartwell testified that he had never received a copy of the April 18 revision. I discredit Hartwell's statement, as well as any other testimony he gave which cannot be independently corroborated.

C. *Analysis and Conclusions*

Section 8(d) of the Act requires all parties to a collective-bargaining agreement to embody the terms of an oral agreement into a written signed contract. While the Board cannot compel the making of an agreement,[10] once an oral understanding has been reached the Board can compel the execution of a written agreement. Parties to an existing contract have no obligation to renegotiate a contract during the term of that contract but, once they agree to do so, the same legal obligation of incorporating oral understandings into a written, signed document comes into play. *Hospital Employees District 1199-C (Episcopal Hospital)*, 241 NLRB 270 (1979); *Pacific Coast Metal Trades Council (Lockheed Shipbuilding)*, 282 NLRB 239 (1986). In such instances, there is no necessity that the conventional notice, required by Section 8(d) to begin negotiations at the end of a contract term, be given to state and Federal agencies or to the other contracting parties. The fact that the parties may disagree as to the interpretation or application of agreed-on language to a particular fact situation does not excuse compliance with Section 8(d). *Diplomat Envelope Co*., 263 NLRB 525 (1982).

A great deal of argument was directed at the question of whether the Respondent ever agreed to the upgrading of employees from the bindery to the shipping and receiving department (from the ''D'' classification to the ''C'' classification) under the new work pool article and whether the failure of the parties to reach an agreement on this point precludes the Board from directing written adherence to the entire revised contract which was presented to the Respondent on April 18. This argument strikes me as being a revisitation of the first charge which the Regional Office dismissed. The revised contract language in the April 18 draft placed this issue at an end by specifically excluding the shipping and receiving department from the provisions of the work pool article. If, as Hartwell testified, the Respondent is still engaging in such conduct, such matter is properly a question for an arbitrator under the grievance machinery, not for the Board.

How the ''lack of work'' exception to the new weekend overtime provision applies when lack of work occurs on a Saturday and an employee thereafter is called to work on Sunday is a matter of contract interpretation. It is clear that the parties agreed to the weekend overtime provision and that they further agreed that the phrase ''lack of work,'' along with military service, jury duty, and other absences should be included in the contract as a means of fulfilling a workweek requirement so as to bring about an entitlement for overtime in lieu of hours actually worked. Like other matters of contract interpretation, this question is one for an arbitrator, not for the Board, since the parties agreed not only on concepts but on actual contract language respecting weekend overtime and that language was contained in the April 18 revision and earlier drafts as well. Hartwell was not speaking truthfully, either to the Board or his own membership, when he said that the parties had merely agreed to a framework respecting weekend overtime and that there would be additional negotiations following ratification to hammer out the meaning of the weekend overtime section in specific situations. He had the actual language of the proposal in hand during the ratification meeting and the language of that contract clause, to the effect that changes could be brought about only by mutual consent, flatly contradicts his assertions.

There is no doubt that the new contract, ratified on October 19 under threat of plant closure, was a bitter pill to swallow. By the Company's own estimate, unit employees lost nearly 25 percent of the value of a former contract which had been concluded only a year before and was still in effect until that time. It clearly appears that both Hartwell and his executive board made up their minds that they simply were not going to sign the new contract, come what may. Their tactics from October 19 onward provide repeated illustrations of this state of mind. The centerpiece of this strategy was to engage in endless, ongoing negotiations even after their bargain had been struck and they had been informed that the plant would remain open in order to recoup some fragments of what they had just lost. This strategy was supplemented by endless assertions of unspecified errors in contract drafts presented for signature. With regard to the April 18 final draft, Hartwell claimed it was full of errors even before he had read it. When he was asked to sit down and go over the draft to point out the errors, he declined. Once the charge in this case was filed, he had no other contact with the Company concerning the contract. Between the time of the filing of the charge in this case and the hearing, 9 months had elapsed but at no time during that lengthy interim did the Respondent point out to the Company any specific deviation between the language of the final draft and what it felt had actually been agreed on in negotiations.

The Board has long held that parties in negotiations have an affirmative duty to assist in reducing the terms of an oral collective-bargaining agreement to writing. *Kennebec Beverage Co*., 248 NLRB 1298 (1980); *Diplomat Envelope*, supra. In this case, not only did the Respondent fail to make any affirmative effort to provide an acceptable draft of an agreement which did not contain the endless array of asserted errors it continued to find. It went out of its way to frustrate the efforts of the Company in drafting such an agreement, repeatedly claiming newly discovered errors and then refusing to spell out those errors so that they could be promptly corrected. In the meantime the Respondent and its members received their quid pro quo under the revised contract. The Salem plant remained open and the Respondent's membership retained their jobs. These belatedly claimed errors were also part of previous drafts the parties had discussed between the date of the ratification and March 7, when the contract draft giving rise to the first unfair labor practice charge was mailed to Hartwell by Feagans. No protests were voiced by the Respondent as to these items during this extended period of time. Accordingly, the Respondent should be estopped at this point from asserting, as a defense to the complaint, the existence of any alleged errors in the April 18 draft which it could have presented and ironed out a year ago and which Hartwell was invited to bring to the Company's attention when Feagans spoke with him in mid-April 1990. Avoiding a legal obligation to sign a written contract though a cat-and-mouse game is not a practice which the Board should sanction and approve, and such has been the Respondent's game since the filing of the charge in this case and even before.

[10] *NLRB v. H. K. Porter*, 397 U.S. 99 (1970).

The Respondent's final defense must be seriously addressed.[11] It involves the interests, powers, and prerogatives of persons not parties to this proceeding who were not directly involved in the negotiations at issue nor the events which followed thereafter. The contract which the parties signed in 1988, as well as every contract draft presented to the Respondent throughout this controversy, contained the following language:

> INTERNATIONAL APPROVAL
>
> 1. The terms and conditions of this Agreement are subject to review of the International and the Agreement does not become a valid and binding document without the approval of the International President.
>
> Such approval does not, however, under any circumstances make the International responsible for the observance of this Agreement or of any breach thereof.
>
> APPROVED BY: _____
> JAMES NORTON
> International President

There is no suggestion that the International president ever signed any of the drafts presented to the Respondent for signature nor is there any suggestion that any of the drafts, including the April 18 draft, was ever submitted to the International president for his approval. The Respondent contends that such approval is a condition precedent to the validity of the contract and that, without International approval, the Respondent cannot be held to the terms of the contract nor forced to sign it.

The Respondent correctly points out that the clause here in question is identical in language to the one involved in *Hiney Printing Co.*, 262 NLRB 157 (1982), a case which also involved midterm bargaining that resulted in substantial givebacks from contract provisions which had been agreed on only a short time before the employer came to the union with a plea of poverty and a request for substantial relief. In that case, both the Board and I held that approval of the revised contract by the International was a condition precedent to its effectiveness and that the local which had negotiated a midterm giveback could not be compelled under the Act to execute a new agreement in the absence of approval by its International. Respondent urges adherence to the *Hiney* rule in this case.

In addressing this question, I place no reliance on a procedural contention that the Respondent should not be permitted to raise the issue in its posttrial brief because it did not do so either at the hearing or in its pleadings. Respondent had no obligation to plead an affirmative defense. The Board's Rules and Regulations require only that an answer admit or deny each allegation in a complaint and nothing more. In asserting a plea of limitations, the Board has required it be mentioned by a respondent at the hearing, not merely in posttrial memoranda or exceptions, because the Board regards limitations under Section 10(b) of the Act as an affirmative defense, not a jurisdictional matter. Other than limitations, I know of no other matter which cannot be raised after the hearing is closed if an adequate factual predicate has been laid in the record, The question of whether a condition precedent exists which must be fulfilled before the Respondent is obligated to sign is an element of the General Counsel's case. It must be established by the General Counsel in order to make out a violation of the Act and is not a procedural defense. What is required of a respondent who relies on such an argument is that the record compiled at the hearing contain sufficient evidence to support the argument.

In this case, there is an adequate factual predicate in the record to support the Respondent's argument relating to the requirement for International approval before the new contract negotiated by the Respondent became final and binding. That predicate was laid by evidence adduced principally by the General Counsel from documents generated from the Company's own computer. Every complete contract or contract proposal placed in the record, starting with the 1988–1991 agreement and going through the April 18, 1990 final draft, contained the above-quoted language relating to the necessity for approval by the International president. Hartwell mentioned the failure of the International president to approve the final draft as one of the errors which should preclude the Board from ordering his signature on the final draft. This contention was voiced during his testimony at the hearing when he was examined by his attorney and before cross-examination began. The General Counsel and the Charging Party claim that they were not put on notice during the hearing that this question was a live issue in the case and argue that the Respondent should be precluded now from raising the question in its posttrial brief. What occurred at the hearing is that the General Counsel and the Charging Party did not appreciate the full import of the evidence they were placing in the record because the Respondent did not make a loud argument at the time concerning the meaning and effect of these documents. This does not prevent the Respondent from doing so later on. In its supplemental memorandum, the Charging Party attached an affidavit given by Saxer concerning the attention or lack of attention paid to this clause by the parties in past negotiations. I am reopening the record to admit this affidavit into evidence and have read and considered its contents. Saxer's testimony does not squarely address some critical points.

The thrust of Saxer's statement is that, in all the time the parties have dealt with each other, starting in 1976, the Union has never submitted a contract to its International for ratification and has never informed the Company that agreement to any contract was ever conditioned on such approval. The fact that the Respondent may not have insisted on International approval as a condition of its own approval during previous contract negotiations in no way precluded it from doing so during the midterm negotiations which took place in October 1989. Moreover, the Charging Party is in a poor position to say that the Union never placed it on notice in 1989 that it was conditioning local agreement on approval by the International when the evidence of such notice comes from the data bank in the Company's own computer system. Bold and uncategorical language requiring International approval glares forth from every contract draft which the Company prepared and tendered to the Respondent. The Board simply cannot blink at such language and pretend it is not there. Any relaxation of the requirement for International approval must stem from some other consideration.

[11] For this reason I requested and received supplemental briefs directed to this point.

No one contends that, in the year and a half which had elapsed since the membership of the Respondent Local ratified the final Company proposal on October 19, the Respondent ever submitted the ratified contract proposal to its International or that the International even had knowledge of its existence. There is certainly nothing in the record which remotely suggests that this ever occurred. Yet, as with the other so-called errors on which the Respondent now relies to avoid an order directing it to sign the final revised draft, the Union and its membership have received the benefit of their bargain, namely the continued operation of the Salem plant. However, the Respondent has changed its announced position by letting the April 1, 1990 deadline pass without closing the plant. The existence of a requirement for International approval suggests a correlative duty of due diligence on the part of a local to seek such approval or at least to bring the contract to the attention of the International for its consideration. Whether, for good reason, bad reason, or no reason at all an International may thereafter refuse to approve is not a question in this case because the International was never asked.

The dilatory tactic of the Respondent in failing to seek International approval, obtaining the benefit of its bargain, and then asserting the failure of the International to approve the contract as a basis for failing to execute the agreement gives rise to an estoppel situation. Accordingly, on the basis of the facts and circumstances of this case, I conclude that the Respondent has been estopped from asserting this defense, even though it might have made telling use of this contract requirement had it acted in a timely fashion. Accordingly, I conclude that, by failing and refusing to execute the draft of a contract presented to it by the Charging Party on April 18, 1990, the Respondent has violated Section 8(b)(3) of the Act.

CONCLUSIONS OF LAW

1. Salem Gravure, a Division of World Color Press is an employer engaged in commerce within the meaning of the Act.

2. The Respondent, Local 554, Graphic Communications International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All bindery, shipping and receiving, and general services department employees, and all stock coordinators, warehouse clerks, production and mail clerks, and dispatchers employed by the Respondent at its Salem, Illinois plant, exclusive of pressmen, photoengravers, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Respondent has been the exclusive collective-bargaining representative of the employees employed in the unit described above in Conclusion of Law 3.

5. By failing and refusing to execute the collective-bargaining agreement prepared and presented to it for signature on or about April 18, 1991, the Respondent violated Section 8(b)(3) of the Act. The aforesaid unfair labor practice has a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend to the Board that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. I will recommend to the Board that the Respondent be directed to execute the contract presented to it for signature by the Company on or about April 18, 1991, and that it be required to post the usual notice informing its members of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Local 554, Graphic Communications International Union, AFL–CIO, Salem, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to execute the collective-bargaining agreement presented to it for signature by the Charging Party on or about April 18, 1991.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, execute forthwith the contract presented to it for signature by the Charging Party on or about April 18, 1991.

(b) Post at its Salem, Illinois office copies of the attached notice marked ''Appendix.''[13] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that copies of the notices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for Region 14 signed copies of the aforementioned notice for posting by Salem Gravure, if it is willing, in places where notices to employees are customarily posted. Copies of the notices to be furnished to the aforesaid Regional Director shall, after being signed by the Respondent as indicated, be returned forthwith to the Regional Director for disposition.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''